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FILED
AUG 14 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,

Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly ruled that law enforcement officers violated clearly established law, and thus were not entitled to qualified immunity, when at the time they acted there was no decision by the Supreme Court or any other court so holding, and the only three decisions of lower courts addressing this issue had found that the same conduct did not violate the law?

2. Whether law enforcement officers violate clearly established law under the Fourth Amendment, thus invalidating their defense of qualified immunity, when they allow members of the news media to accompany them and report on their conduct in properly executing a valid warrant?

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REPLY BRIEF FOR PETITIONERS

Respondents seek to characterize the petition as raising only pedestrian questions about the application of settled law in specific cases. Opp. 13-15. But they never manage to explain how the decision below can be reconciled with controlling precedent from this Court, nor do they successfully dispel the clear split between the Second and Ninth Circuits, on the one hand, and the Eighth and Fourth Circuits, on the other, which those courts themselves have noted in recent opinions. Finally, respondents do not contest the importance of the qualified immunity issues raised squarely and cleanly in the petition, which implicate both effective law enforcement and public oversight of it in first-hand reports by the media and the press.

As stated at more length in the petition, *see* Pet. 10-15, this case raises an issue that arises frequently in the lower courts and that is crucial to preserving the objectives served by the defense of qualified immunity: when there is no binding authority from the Supreme Court or the Court of Appeals to resolve the issue of whether the law was clearly established at the time of the acts in question so as to invalidate a defense of qualified immunity, what weight (if any) is to be given to the decisions of other courts on the specific issue at stake? In particular, where other courts had held that essentially the same conduct was *lawful* at the time, is it proper for a court to reject a defense of qualified immunity and can such a ruling be squared with the Court's precedents? Respondents seek to wish the question away by contending that lower court decisions that are unpublished are not binding law. Opp. 19. This position, however, is obviously troubling in its own right and, in any event, fails to respect this Court's holding in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which explicitly determined that two unpublished lower court decisions upholding the legality of specific conduct sufficed to demonstrate that the law was not "clearly established" to the contrary at that time. *Id.* at 533.[1]

Respondents would have the Court believe that though the lower courts by now are quite aware of the basic parameters of qualified immunity doctrine -- that the law must be "clearly established" at the time of the pertinent conduct to forfeit the immunity defense; that subsequent cases are not to be taken into account in ascertaining such "clearly established" law; that the rights in question must be defined at a fairly specific level of generality; and that courts are to begin with precedents from the Supreme Court and the relevant Court of Appeals in identifying what law is "clearly established" -- no further disputes ever arise in this area that are worthy of plenary review. This case,

[1] Respondents attempt to distinguish *Mitchell* by asserting that the law was more "clearly established" in that case than it was here. Opp. 16 n.16. But the foundation for the Court's analysis in *Mitchell* was, as it should have been here, that two lower federal courts had upheld the lawfulness of such conduct in prior unpublished decisions. *See* 472 U.S. at 533. There is no other material point of distinction between the two cases.

however, and many others recently granted and resolved by this Court, repudiate this notion. Indeed, the Court recently granted summary reversal of another Ninth Circuit decision that distorted the proper qualified immunity analysis, *see Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam), and the same result is warranted in this case.

Here the Ninth Circuit purported to throw out petitioners' defense of qualified immunity based on the observation "that no circuit decision has ever upheld the constitutionality" of their conduct. Pet. App. 11a-12a. This was fundamental error. More germane to the proper inquiry was that at the time these officers acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that their actions were unlawful. The District Court analyzed the issue correctly, *see* Pet. App. 34a, but the Court of Appeals simply ignored its reasoning to upset its result. Indeed, the Ninth Circuit shunted aside a consistent string of lower court decisions that had upheld the lawfulness of such conduct in virtually the same circumstances, which should have been dispositive. *See Moncrief v. Hanton*, 10 Med. L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984); *Higbee v. Times-Advocate*, 5 Med. L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980). *See also Avenson v. Zegart*, 577 F. Supp. 958 (D. Minn. 1984) (same holding on equal protection claim). Respondents fabricate distinctions in an attempt to deride these decisions, but none supplies the clear defect of the Ninth Circuit's upside-down analysis on the qualified immunity issue.

As noted in the petition, the Court has previously declined to decide when and in what circumstances lower court decisions can resolve the central question of whether the law was "clearly established" one way or the other for qualified immunity purposes, and the issue has not received consistent treatment by the federal courts of appeals. *See* Pet. 12-13 & n.2 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). By applying the approach taken in *Mitchell*, however, the Court could reaffirm that where no controlling authority clearly establishes the law one way or the other, and the corpus of decisions from

other jurisdictions tends to confirm that the law was either unsettled or was settled in favor of the validity of such conduct, the defense of qualified immunity must be upheld. *See also Procunier v. Navarette*, 434 U.S. 555, 563-65 & nn.8-10 (1978) (same); *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (same). Only by that means can law enforcement officers "reasonably anticipate when their conduct may give rise to liability for damages" and act accordingly. *Davis v. Scherer*, 468 U.S. 183, 195 (1984).

Respondents also unconvincingly assert that the lower courts are not divided on the precise issue posed in this case: whether law enforcement officers violate clearly established law under the Fourth Amendment, thus invalidating their defense of qualified immunity, when they allow members of the news media to accompany them and report on their conduct in properly executing a valid warrant. *See* Opp. 23-24. To the contrary, as detailed in the petition, the Ninth Circuit has sided with the Second Circuit, against the Eighth and Fourth Circuits, by rejecting the defense of qualified immunity raised by petitioners here. *See* Pet. 16-22.

Respondents argue that the ruling in *Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998) (en banc), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. July 7, 1998) (No. 98-83), does not create a conflict because there the Fourth Circuit "refused to follow this Court's clear authority." Opp. 23. Respondents go on to raise the red herring that "*Wilson* is not in conflict with *Ayeni v. Mottola*[, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995),] or *Berger* on the reach of the Fourth Amendment as the Fourth Circuit failed to decide the issue." Opp. 23-24. Perhaps that is so, but the clear conflict among these cases is on the qualified immunity issue itself -- a point that respondents do not even contest. In addressing *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), respondents weakly suggest that the Eighth Circuit "just reached a different conclusion," Opp. 24, but in the next breath they argue that the court would have reached the same conclusion had it "conducted the appropriate analysis," *id.* at 24 n.23 -- a classic, if unwitting, acknowledgment that there is a

square conflict both in result and in reasoning between these decisions.

A more candid assessment, which reinforces this same recognition of a direct circuit split, was rendered by Judge Murnaghan writing separately in the *Wilson* case, where he observed that "[t]he majority's *en banc* opinion adds our Circuit's voice to the split between the Second and Ninth Circuits on the one hand and the Eighth Circuit on the other. Given the prevalence of real-life police dramas on television, other circuits will face this question soon enough." *Wilson*, 141 F.3d at 132 (Murnaghan, J., dissenting).

This observation underscores the significance of these issues for effective law enforcement, which is enhanced when its activities are reported to the public regularly and accurately. In *Wilson*, the Fourth Circuit correctly stated that "a legitimate function of law enforcement [is] to facilitate accurate reporting on law-enforcement activities and to improve public oversight of those activities by use of the press. These efforts are important because *both* the deterrence of crime *and* the deterrence of improper conduct by law-enforcement officers are vital to the broader mission." *Wilson*, 141 U.S. at 118 (quotations omitted). Until the circuit split on the qualified immunity issue is resolved, however, law enforcement officers operating within the bounds of the Ninth and Second Circuits will be forced to execute warrants in secret if they wish to avoid being sued personally for money damages. The resulting closed regime of law enforcement operations would be antithetical to the core principles embodied in both the First and Fourth Amendments. For these reasons, either summary reversal or a grant of *certiorari* is warranted in this case.

CONCLUSION

Petitioners respectfully request that the decision of the Ninth Circuit be summarily reversed in this case. In the alternative, the petition for a writ of *certiorari* should be granted and the case set for plenary review on the merits of the qualified immunity issue.

Respectfully submitted,

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August 1998